

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

NAJAT SANAD, et al.,

Plaintiffs,

vs.

BERNINI, INC., et al.,

Defendants.

Case No. 2:07-cv-00587-PMP-GWF

**ORDER**

This matter is before the Court on Plaintiff's Ex Parte Application for Order to Show Cause Why A Prejudgment Writ of Attachment With Notice Should Not Issue And Appointment Of A Receiver (#12), filed on September 19, 2007; Defendants Corrected Opposition to Plaintiff's Ex Parte Application for Order to Show Cause Why A Prejudgment Writ of Attachment With Notice Should Not Issue And Appointment Of A Receiver (#16), filed on September 26, 2007, and Plaintiff's Reply In Support of Ex Parte Application for Order to Show Cause Why A Prejudgment Writ of Attachment With Notice Should Not Issue And Appointment Of A Receiver (#17), filed on September 26, 2007. Also before the Court is Defendants' Motion for Leave to File Surreply and Defendants' Surreply to Plaintiffs' Reply in Support of Ex Parte Application for Order to Show Cause Why a Prejudgment Writ of Attachment with Notice Should Not Issue (#18), filed September 27, 2007.

**BACKGROUND AND DISCUSSION**

Plaintiffs Najat Sanad, Ousman Gueye and Abdel Kadar Elouti filed this action on May 3, 2007 against Defendants Bernini, Inc., a California corporation and Bernini Holdings, a California

1 corporation (collectively referred to as Defendant), alleging claims for failure to pay overtime wages,  
2 etc., under Nevada Revised Statute (NRS) Chapter 608 and in violation of the Fair Labor Standards Act  
3 29 U.S.C. § 201, *et. seq.* Plaintiffs seek to pursue a class action on behalf of Nevada-based employees,  
4 and Plaintiffs allege a collective action under 29 U.S.C. § 216(b) on behalf of similarly situated  
5 employees nationwide. Plaintiffs' complaint seeks recovery of damages, restitution, and declaratory  
6 and injunction relief. At this point, a class action has not been certified. Nor have other employees,  
7 allegedly similarly situated, opted in as parties plaintiff in the collective action. The extent to which  
8 this action may or will proceed as a class action under Fed.R.Civ.Pro. 23, or as a collective action under  
9 29 U.S.C. § 216(b), has not been determined.

10 Plaintiffs have applied for issuance of a writ of attachment after notice and hearing pursuant to  
11 NRS 31.013. NRS 31.013.3 provides that the court may, after notice and hearing, order the clerk to  
12 issue a writ of attachment in any case where the court finds that extraordinary circumstances exist  
13 which will make it improbable for the plaintiff to reach the property of the defendant by execution after  
14 the judgment has been entered. NRS 31.017.4 and 5 also provide that the court may order a writ of  
15 attachment to be issued without notice only in an action by a resident of this state where the defendant  
16 is about to remove his money or property, or any part thereof, from this state and the defendant's  
17 property which may remain in this state, if any, will be insufficient to satisfy plaintiff's claim; or where  
18 the defendant is about to give, assign, hypothecate, pledge, dispose of or conceal his money or property  
19 or any part thereof, and the defendant's property or money remaining in the state or that remaining  
20 unconcealed will be insufficient to satisfy plaintiff's claim. The grounds for issuance of a writ of  
21 attachment without notice are presumably also grounds for an application for issuance of a writ of  
22 attachment after notice and hearing.

23 NRS 31.020 provides that an application for a writ of attachment must be accompanied by an  
24 affidavit of the plaintiff or of any other person having personal knowledge of the facts. The affidavit  
25 must set forth clearly the nature of plaintiff's claim for relief and that the same is valid, and describe in  
26 reasonable and clear detail all facts which show one or more grounds for attachment. NRS 31.024  
27 provides that if the plaintiff's affidavit, alone or as supplemented by additional evidence received by the  
28 court, meets the requirements of NRS 31.020, the court shall issue an order directed to the defendant or

1 debtor to show cause why the order for attachment should not be issued. A conclusory affidavit,  
2 however, provides no basis for a court to issue a writ of attachment. *Paramount Insurance v. Rayson &*  
3 *Smitley*, 86 Nev. 644, 650, 472 P.2d 530 (1970).

4 In their Application for Order to Show Cause Why A Prejudgment Writ of Attachment With  
5 Notice Should Not Issue And Appointment Of A Receiver (#12), and in their Reply (#17) filed in  
6 response to the Defendant's Opposition (#16), the three Plaintiffs allege that they are entitled to recover  
7 approximately \$25,000, each, under their FSLA claims. Plaintiffs' counsel further alleges that the total  
8 amount of the FSLA claims will be \$8 million to \$10 million if the class action is certified and/or other  
9 similarly situated plaintiffs opt-in to the collective action. Neither the affidavit of Plaintiffs' counsel  
10 attached to the Application (#12) nor the affidavit of Plaintiff Gueye submitted with their Reply (#17),  
11 set forth admissible factual information that would reasonably demonstrate that their claims are valid.  
12 Rather, the application and affidavits are generalized allegations that Defendant has failed to pay  
13 overtime pay to Plaintiffs or committed other violations of Nevada and federal law. The Reply brief  
14 and affidavits attached thereto can best be described as an attempt to assassinate the character of the  
15 Defendant and its officers through generalized allegations regarding their dishonest business practices.  
16 These allegations are not sufficient to demonstrate the validity of Plaintiffs' claims for purposes of  
17 issuing a writ of attachment. Additionally, Plaintiffs' Application has not provided the Court with  
18 factual information regarding the number of employees who may be involved in the putative class or the  
19 potential number of collective action employees who may potentially opt-in to this action. The  
20 potential class or collective action at this point and the amount of damages that may ultimately be  
21 recoverable in this case is speculative and conjectural.

22 Plaintiffs allege that Defendant will likely transfer and/or conceal assets such that it will be  
23 improbable, if not impossible, for Plaintiffs to execute on a judgment. Plaintiffs also allege that there  
24 "are strong suggestions" that Defendant is about to give, assign, hypothecate, pledge, dispose of or  
25 conceal money or property to frustrate Plaintiffs' ability to collect a judgment. In support of these  
26 allegations, Plaintiffs cite three alleged facts: (1) that since the inception of this action, Defendant has  
27 closed one of its stores in Las Vegas, Nevada, (2) that Defendant's corporate status in Nevada is in  
28 default, and (3) that during a settlement conference or discussion, Defendant's local counsel stated that

1 Defendant was planning to file bankruptcy. Although these factual allegations, if true, would give rise  
2 to a suspicion that Defendant might transfer or conceal its assets, the allegations, in themselves, do not  
3 satisfy the Court that Defendant is attempting to transfer or conceal its assets to avoid payment of a  
4 potential judgment in this case.

5 Without waiting for the Court to decide whether to issue an order to show cause on Plaintiffs'  
6 Application, Defendant has responded for purposes of refuting Plaintiffs' Application and to also  
7 request that the Court sanction Plaintiffs' counsel pursuant to 28 U.S.C. § 1927 for filing a frivolous  
8 application for a writ of attachment. In its Opposition (#16), Defendant acknowledges that it has closed  
9 one of its Las Vegas stores, but states that it did so involuntarily because the landlord terminated its  
10 lease. Defendant also states that it engaged in litigation with the landlord regarding the termination.  
11 Defendant states that it continues to operate its other stores in Las Vegas and has transferred its  
12 inventory from the closed store to the other store locations in Las Vegas. The second Defendant states  
13 that it is in good standing as a foreign California corporation and has attached more current  
14 documentation from the Nevada Secretary of State that shows that its corporate status is in good  
15 standing. Defendant further states that the "default" on which Plaintiffs rely resulted from an  
16 inadvertent error by Defendant in not filing its current list of officers which has since been corrected.  
17 Finally, Defendant disputes the assertion that its counsel informed Plaintiffs' counsel that Defendant  
18 intends or is planning to file bankruptcy, thereby suggesting its insolvency.

19 Plaintiffs' Reply argues that the Court should not accept Defendant's representations because of  
20 its dishonest conduct. Plaintiffs have not, however, refuted the information provided by Defendant  
21 regarding the circumstances regarding the closure of one of its stores, that it still operates other stores  
22 with substantial real property and personal property value or that Defendant is an active corporation in  
23 compliance with Nevada law. Counsel continue to dispute what Defendant's local counsel stated  
24 regarding Defendant's alleged intention to file bankruptcy.

25 Based on the information provided, the Court finds that Plaintiffs have failed to provide the  
26 Court with sufficient evidence in its Application or in its Reply for the Court to order Defendant to  
27 show cause why a writ of attachment should not issue. Plaintiffs' Application and affidavits do not  
28 sufficiently demonstrate to the Court that their claims against Defendant are valid or that the claims

1 have or will have value of \$8 million to \$10 million. While this may be a case in which substantial  
2 damages will be alleged based on numerous claimants, it may also be a case in which only three  
3 claimants with claims totaling approximately \$75,000 are litigated. Plaintiffs have also failed to  
4 sufficiently demonstrate by affidavits based on personal knowledge that extraordinary circumstances  
5 exist to support the issuance of a writ of attachment based on information that Defendant is about to  
6 remove its money or property, or any part thereof, from this state or is about to give, assign,  
7 hypothecate, pledge, dispose of or conceal its money or property or any part thereof.

8         Given this, Plaintiffs have also not met the even greater showing required for this Court to grant  
9 the request for appointment of a receiver. *Bowler v. Leonard*, 70 Nev. 370, 269 P.2d 833, 841-42  
10 (1954). As *Bowler* states, receivership is generally a remedy of last resort. Absent an adequate  
11 showing that good cause exists for this Court to issue an order to show cause for attachment on the  
12 grounds that Defendant is about to transfer or conceal its assets to render a judgment uncollectable, the  
13 Court also finds no grounds at this time for the appointment of a receiver. The Court also finds that  
14 Plaintiffs have not demonstrated sufficient facts at this time that would justify the entry of an order  
15 permitting Plaintiffs to conduct special discovery to explore Defendant's financial condition. Again,  
16 the conclusory assertions made by Plaintiffs in their Application and Reply fail to make a sufficient  
17 showing for this Court to issue an order to show cause why a writ of attachment should not issue. Such  
18 allegations are likewise insufficient to support the issuance of an order permitting a party to engage in  
19 discovery regarding Defendant's financial condition.

20         In regard to Defendant's counter-motion for sanctions under 28 U.S.C. § 1927, the Court is  
21 frankly disturbed both by the insufficiency of Plaintiffs' application and by Plaintiffs' counsel's failure  
22 in the Application to disclose to the Court the preceding "letter war" between counsel regarding  
23 Defendant's counsel's alleged statements that Defendant intends to file bankruptcy. Since that  
24 statement formed one of the alleged factual grounds for Plaintiffs' application, Plaintiffs' counsel had  
25 an ethical obligation to provide the Court with reasonably complete information known to him  
26 regarding this disputed statement. Secondly, Plaintiffs' Reply (#17) essentially asks this Court to issue  
27 an order to show cause why a writ of attachment should not issue on the basis that Defendant is a  
28 dishonest and racist business which cheats its employees and customers. These assertions, however, are

1 based on nothing more than the unsupported allegations contained in Plaintiff Gueye's affidavit which  
2 relies, in part, on a hearsay complaint by a customer who was reportedly defrauded by Defendant.  
3 Plaintiffs also submit a police report regarding an alleged battery committed on Plaintiff Sanad by one  
4 of Defendant's security officers and the allegation that Defendant's store manager was caught  
5 attempting to delete security tapes. This is not admissible evidence to prove the truth of the allegations  
6 contained therein and obviously does not provide the Court with grounds to issue an order attaching  
7 Defendant's property based on a generalized conclusion that it is a dishonest or racist business.

8 Accordingly,

9 **IT IS HEREBY ORDERED** that Plaintiffs' Ex Parte Application for Order to Show Cause  
10 Why A Prejudgment Writ of Attachment With Notice Should Not Issue And Appointment Of A  
11 Receiver (#12) is **denied**.

12 **IT IS FURTHER ORDERED** that the Court hereby sets this matter for hearing on  
13 Wednesday, October 11, 2007 at 9:30 a.m. in Courtroom 3A on Defendants' counter-motion for  
14 sanctions (#16).

15 **IT IS FURTHER ORDERED** that Defendants' Motion for Leave to File Surreply and  
16 Defendants' Surreply to Plaintiffs' Reply in Support of Ex Parte Application for Order to Show Cause  
17 Why a Prejudgment Writ of Attachment with Notice Should not Issue (#18) is **denied**.

18 DATED this 28th day of September, 2007.

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21 GEORGE FOLEY, JR.  
22 United States Magistrate Judge  
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